United States Department of Labor
Employees' Compensation Appeals Board

Z.D., Appellant	)	
	)	**Docket No. 17-1315**
and	)	**Issued: October 12, 2017**
	)	
DEPARTMENT OF AGRICULTURE, FOOD SAFETY INSPECTION SERVICE, Argyle, NY, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
PATRICIA H. FITZGERALD, Deputy Chief Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On May 30, 2017 appellant filed a timely appeal from a January 18, 2017 merit decision and a March 21, 2017 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[1] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.[2]

ISSUES

The issues are: (1) whether appellant met his burden of proof to establish a back condition causally related to a November 1, 2016 employment incident; and (2) whether OWCP properly denied appellant's request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

[1] 5 U.S.C. § 8101 *et seq.*

[2] The Board notes that appellant submitted new evidence accompanying his appeal. The Board is precluded from reviewing evidence which was not before OWCP at the time it issued its final decision. Thus, the Board may not consider the new evidence. *See* 20 C.F.R. § 501.2(c)(1).

On appeal appellant contends that a medical report from his healthcare provider documents his work-related injury.

FACTUAL HISTORY

On November 18, 2016 appellant, then a 79-year-old supervisory public health veterinarian medical officer, filed a traumatic injury claim (Form CA-1) alleging that on November 1, 2016 he had acute severe back pain as a result of a motor vehicle accident.

In support of his claim, appellant submitted a New Lebanon Police Department Accident Information Exchange Form regarding the November 1, 2016 incident. He also submitted a December 6, 2016 memorandum from his supervisor, W.M., who related that appellant was in the performance of duty at the time of the November 1, 2016 incident.

By letter dated December 13, 2016, OWCP advised appellant of the deficiencies of his claim and requested that he submit medical evidence. It also requested that the employing establishment submit treatment notes if appellant was treated at an employing establishment medical facility.

Appellant submitted a November 2, 2016 medical report in which Dr. James C. Hicks, an attending Board-certified family practitioner, noted that appellant presented with back pain from a motor vehicle accident on November 1, 2016. Dr. Hicks discussed appellant's medical history and diagnosed back muscle strain.

Appellant also submitted an authorization for examination and/or treatment (Form CA-16) that was signed on December 6, 2016 by the employing establishment. The employing establishment noted an injury date of November 1, 2016 and that appellant had injured his back. On the reverse side of the claim form dated January 1, 2017, Dr. Hicks again indicated that appellant was involved in a motor vehicle accident on November 1, 2016 and had back pain. He diagnosed low back strain and indicated by checking a box marked "yes" that the diagnosed condition was caused or aggravated by an employment activity. Dr. Hicks also indicated that appellant was totally disabled from November 1 to 2, 2016. He released appellant to return to regular work on November 3, 2016.

By decision dated January 18, 2017, OWCP denied appellant's traumatic injury claim as the medical evidence of record did not contain a medical diagnosis in connection with the accepted November 1, 2016 employment-related incident.

In an appeal request form dated February 18, 2017 and received by OWCP on February 28, 2017, appellant requested an oral hearing before an OWCP hearing representative.[3]

By decision dated March 21, 2017, OWCP's Branch of Hearings and Review denied appellant's hearing request as it was untimely filed. It found that the request was postmarked February 18, 2017, which was not within 30 days of the issuance of OWCP's January 18, 2017

[3] The record includes an imaged copy of the envelope that contained the hearing request. However, the postmark date is illegible.

decision. After exercising its discretion, OWCP further found that the issue in the case could be equally well addressed through the reconsideration process.

LEGAL PRECEDENT -- ISSUE 1

An employee seeking benefits under FECA[4] has the burden of proof to establish the essential elements of his or her claim by the weight of the reliable, probative, and substantial evidence[5] including that he or she sustained an injury in the performance of duty and that any specific condition or disability from work for which compensation is claimed is causally related to that employment injury.[6]

To determine whether a federal employee has sustained a traumatic injury in the performance of duty, it first must be determined whether fact of injury has been established.[7] There are two components involved in establishing fact of injury. First, the employee must submit sufficient evidence to establish that he actually experienced the employment incident at the time, place, and in the manner alleged.[8]

The second component is whether the employment incident caused a personal injury and generally can be established only by medical evidence.[9] The evidence required to establish causal relationship is rationalized medical opinion evidence, based upon complete factual and medical background, showing a causal relationship between the claimed condition and the identified factors.[10] The belief of the claimant that a condition was caused or aggravated by the employment incident is insufficient to establish a causal relationship.[11]

ANALYSIS -- ISSUE 1

The Board finds that appellant has not met his burden of proof to establish a back injury caused or aggravated by the accepted November 1, 2016 employment incident.

Appellant submitted a January 1, 2017 form report from Dr. Hicks who noted a history of the accepted November 1, 2016 employment incident and diagnosed low back strain. He indicated by checking a box marked "yes" that the diagnosed condition was caused or aggravated by an employment activity and found that appellant was totally disabled from November 1

[4] *Supra* note 1.

[5] *J.P.*, 59 ECAB 178 (2007); *Joseph M. Whelan*, 20 ECAB 55, 58 (1968).

[6] *G.T.*, 59 ECAB 447 (2008); *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[7] *S.P.*, 59 ECAB 184 (2007); *Alvin V. Gadd*, 57 ECAB 172 (2005).

[8] *Bonnie A. Contreras*, 57 ECAB 364 (2006); *Edward C. Lawrence*, 19 ECAB 442 (1968).

[9] *John J. Carlone*, 41 ECAB 354 (1989); *see* 5 U.S.C. § 8101(5) (injury defined); 20 C.F.R. §§ 10.5(ee), 10.5(q) (traumatic injury and occupational disease defined, respectively).

[10] *Lourdes Harris*, 45 ECAB 545 (1994); *see Walter D. Morehead*, 31 ECAB 188 (1979).

[11] *Kathryn Haggerty*, 45 ECAB 383, 389 (1994).

to 2, 2016. The Board has held, however, that a checkmark on a form report without supporting rationale, is of limited probative value and insufficient to establish a claim.[12] Dr. Hicks did not explain how or why appellant's diagnosed condition and resultant disability were caused or contributed to by the accepted employment incident. His November 2, 2016 report noted appellant's complaint of back pain from the November 1, 2016 work-related incident and found that he had back muscle strain. However, Dr. Hicks merely repeated the history of injury as reported by appellant without providing his own opinion as to whether appellant's condition was work related. To the extent that he is providing his own opinion, he failed to provide a rationalized opinion regarding the causal relationship between appellant's back condition and the November 1, 2016 employment incident.[13]

The Board finds that appellant has failed to submit rationalized, probative medical evidence sufficient to establish a back injury causally related to the November 1, 2016 employment incident. Appellant therefore did not meet his burden of proof.

On appeal appellant contends that a medical report from his healthcare provider documents his work-related injury. For the reasons set forth above, the Board finds that the medical evidence of record does not establish that appellant sustained a back condition causally related to the accepted November 1, 2016 work incident.[14]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of FECA provides that a claimant for compensation not satisfied with a decision of the Secretary is entitled, on request made within 30 days after the date of the issuance of the decision, to a hearing on his or her claim before a representative of the Secretary.[15] Sections 10.617 and 10.618 of the federal regulations implementing this section of FECA provide that a claimant shall be afforded a choice of an oral hearing or a review of the written record by a representative of the Secretary.[16] A claimant is entitled to a hearing or

[12] *See D.B.*, Docket No. 16-0798 (issued December 2, 2016).

[13] *F.T.*, Docket No. 09-919 (issued December 7, 2009); *George Randolph Taylor*, 6 ECAB 986, 988 (1954) (medical opinions not fortified by rationale are of diminished probative value).

[14] The Board notes that the employing establishment executed a Form CA-16 on December 6, 2016 authorizing medical treatment. The Board has held that where an employing establishment properly executes a Form CA-16, which authorizes medical treatment as a result of an employee's claim for an employment-related injury, it creates a contractual obligation, which does not involve the employee directly, to pay the cost of the examination or treatment regardless of the action taken on the claim. Although OWCP denied appellant's claim for an injury, it did not address whether he is entitled to reimbursement of medical expenses pursuant to the Form CA-16. Upon return of the case, it should further address this matter. *See D.M.*, Docket No. 13-0535 (issued June 6, 2013). *See also* 20 C.F.R. §§ 10.300, 10.304. *L.D.*, Docket No. 16-1289 (issued December 8, 2016).

[15] 5 U.S.C. § 8124(b)(1).

[16] 20 C.F.R. §§ 10.616, 10.617.

review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking and before the claimant has requested reconsideration.[17] Although there is no right to a review of the written record or an oral hearing if not requested within the 30-day time period, OWCP may, within its discretionary powers, grant or deny appellant's request and must exercise its discretion.[18] OWCP procedures require that it exercise its discretion to grant or deny a hearing when the request is untimely or made after reconsideration under section 8128(a).[19]

ANALYSIS -- ISSUE 2

A request for a hearing or review of the written record must, as noted above, be made within 30 days after the date of the issuance of a final OWCP decision. Appellant's February 18, 2017 hearing request was date stamped as having been received by OWCP on February 28, 2017. OWCP noted that the request was postmarked February 18, 2017, which is more than 30 days after its January 18, 2017 decision. However, the imaged copy of the envelope that is in the record before the Board does not have a legible postmark date. Where the postmark is not legible, the hearing request will be deemed timely unless OWCP has kept evidence of date of delivery on the record reflecting that the request is untimely.[20] As noted, the appeal request form is date stamped as having been received on February 28, 2017. Accordingly, the evidence regarding date of delivery reflects that appellant's request is untimely.[21] Therefore, OWCP properly found in its March 21, 2017 decision that appellant was not entitled to an oral hearing as a matter of right because his request was not made within 30 days of its January 18, 2017 decision.[22]

OWCP then properly exercised its discretion by noting that it had considered the matter and denied appellant's request for a hearing because the issue could equally well be addressed through a request for reconsideration.[23] The Board has held that the only limitation on OWCP's authority is reasonableness and an abuse of discretion is generally shown through proof of manifest error, clearly unreasonable exercise of judgment, or actions taken which are contrary to both logic and probable deduction from established facts.[24] In this case, the evidence of record

[17] *Id.* at § 10.616(a).

[18] *Eddie Franklin*, 51 ECAB 223 (1999); *Delmont L. Thompson*, 51 ECAB 155 (1999).

[19] *See R.T.*, Docket No. 08-408 (issued December 16, 2008); Federal (FECA) Procedure Manual, Part 2 -- Claims, *Hearings and Review of the Written Record*, Chapter 2.1601.2(a) (October 2011).

[20] *Id.* at Chapter 2.1601.4a (October 2011). Where the hearing request is mailed directly to the Branch of Hearings and Review, the request will be date stamped, and both the envelope and request will be scanned into the case file. *Id.* at Chapter 2.1601.3a (October 2011).

[21] The Board notes that, even if the record documented that the hearing request was postmarked on February 18, 2017, it would still be untimely filed. Thirty days from January 18, 2017 is Friday, February 17, 2017.

[22] *Supra* note 15; *supra* note 19 at Chapter 2.1601.4(a) (October 2011).

[23] *M.H.*, Docket No. 15-0774 (issued June 19, 2015).

[24] *Daniel J. Perea*, 42 ECAB 214, 221 (1990).

does not indicate that OWCP abused its discretion in its denial of appellant's request for an oral hearing. Accordingly, the Board finds that OWCP properly denied his request for a hearing as untimely filed under section 8124.[25]

CONCLUSION

The Board finds that appellant has failed to meet his burden of proof to establish a back condition causally related to a November 1, 2016 employment incident. The Board further finds that OWCP properly denied his request for an oral hearing as untimely filed pursuant to 5 U.S.C. § 8124.

ORDER

IT IS HEREBY ORDERED THAT the March 21 and January 18, 2017 decisions of the Office of Workers' Compensation Programs are affirmed.

Issued: October 12, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board

[25] *R.P.*, Docket No. 16-0554 (issued May 17, 2016).